

Claimant was receiving treatment at the Holton Family Health Clinic with Roy P. Hall, M.D., on July 25, 2001. At that time, claimant was experiencing ongoing back complaints.

Claimant's next appointment with Dr. Hall was on August 6, 2001. At that time, claimant indicated his back was no better. There was no mention in that medical note of a work-related accident on August 1, 2001.

Claimant's history is also significant in that, on January 19, 2000, he underwent a medical evaluation for the purpose of obtaining Social Security disability benefits. Included in the long list of claimant's ongoing problems was a history of back pain.

Claimant was examined by Sergio Delgado, M.D., on December 12, 2001, at the request of Cheryl Bohl, the claims representative for respondent's insurance company. At that time, Dr. Delgado was provided medical records from numerous medical providers, including an orthopedic clinic and an orthopedic and sports medicine clinic. Included in the medical records was a long history of ongoing back complaints. When Dr. Delgado questioned claimant regarding his past history, Dr. Delgado noted claimant left out numerous instances of prior back problems. Claimant failed to mention the back complaints which occurred in July 2001, just before the alleged accident with respondent. Dr. Delgado opined that the incident alleged by claimant on August 1, 2001, would, in his opinion, rarely cause chronic persistent complaints to the mid and low back. He stated that claimant should have responded to conservative care by this time.

In workers' compensation litigation, it is claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence. See K.S.A. 44-501 and K.S.A. 2001 Supp. 44-508(g).

In reviewing the evidence, the Board finds claimant has failed to prove that he provided notice to respondent of the accident in a timely fashion pursuant to K.S.A. 44-520. That statute allows 10 days for claimant to provide timely notice, stating with particularity the facts associated with that injury. In this instance, the testimony is directly contradictory between claimant and Mr. Gann. The Administrative Law Judge was in the enviable position of assessing both testimonies as both claimant and Mr. Gann testified before the Administrative Law Judge. The Board has, on many occasions, given credence to an administrative law judge's opportunity and ability to assess the testimony of witnesses who appear in person before him. In this instance, with regard to the notice dispute, the Administrative Law Judge apparently found claimant's testimony to be lacking. The Board affirms the Administrative Law Judge's conclusions that claimant does not appear credible regarding what conversations may have occurred between he and Mr. Gann. The Board finds claimant failed to provide notice of accident as required by K.S.A. 44-520.

In his brief to the Board, claimant raises the issue of just cause. However, just cause was not mentioned at the preliminary hearing. Additionally, there was no testimony to support a finding of just cause in this instance. The Board finds claimant has failed to prove his entitlement to benefits in that there is no evidence to support claimant's allegations that there was just cause for his failure to provide notice.

Claimant's argument that respondent failed to post the appropriate workers' compensation notices also fails. Mr. Gann testified that those notices were posted in his office. Claimant's comment that he failed to see those notices does not outweigh Mr. Gann's testimony regarding the location of the required notices.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Brad E. Avery dated February 26, 2002, denying claimant benefits for the above reasons should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of April 2002.

BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
Kevin J. Kruse, Attorney for Respondent
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director